Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

McMILLION DOZER SERVICE, INC.,

Petitioner,

v.

STATE OF LOUISIANA,
DEPARTMENT OF TRANSPORTATION
AND DEVELOPMENT,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State of Louisiana

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a Louisiana statute depriving Petitioner of legal interest on a compensation award from the date that Petitioner's property was taken by the state violate the Takings Clause of the Fifth Amendment, applicable to Louisiana through the Due Process Clause of the Fourteenth Amendment?

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PETITION FOR WRIT OF CERTIORARI

Petitioner McMillion Dozer Service, Inc. respectfully requests that a writ of certiorari issue to review the decree of the Supreme Court of Louisiana in this case.

JURISDICTION AND DECREES BELOW

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. On November 29, 1994, the Supreme Court of Louisiana issued a final decree in this case denying Petitioner's application for writ of certiorari, which application was expressly based upon Petitioner's contention that the 1988 Louisiana statute relied upon by the state appellate court violated the Fifth and Fourteenth Amendments to the United States Constitution. App. 1. The state appellate court rendered its decision on May 31, 1994, and denied rehearing on August 16, 1994. App. 2-14. The original state district court judgment, from which Respondent appealed, was entered on January 28, 1993. App. 15-16. The constitutional issue was fully briefed in the state appellate court by Petitioner after Respondent first raised its contention – on appeal – that the case was governed by the 1988 Louisiana statute. App. 17-24. Even before entry of judgment in the district court, Petitioner submitted a Memorandum citing *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10-11, 104 S.Ct. 2187, 2194 (1984) (Fifth Amendment requires interest from taking), in support of its interest claim. App. 25-27.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states: "[N]or shall private property be taken for public use, without just compensation." This prohibition applies to the states through the "due process" clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF FACTS

On March 28, 1989, the State of Louisiana, Department of Transportation and Development (the "State") filed suit in this matter, taking property owned by McMillion Dozer Service, Inc. ("McMillion"), in connection with the I-310 interchange project at Airline Highway in St. Charles Parish, Louisiana, and deposited into the registry of the Court the sum of $487,952.00 as just compensation to McMillion. Under Louisiana law, the taking of McMillion's property was complete on the date the State filed its Petition and deposit. La. R.S. 48:445.

After obtaining a proper survey of the property (the survey by the State having been incorrect) and after seeking and retaining expert appraisers and reviewing their reports, as well as other documentation in this matter, McMillion filed an Answer on August 16, 1990, specifically alleging that the value of the property taken by the State and the severance damages to the remaining McMillion property exceeded the amount of money deposited by the State into the registry of the Court by at least $369,048.00, plus other consequential damages, including delay damages and business damages.

After a trial January 12-14, 1993, a jury found that just compensation for McMillon was $376,000.00 for the land taken, $375,000.00 for severance damages, and $300,000.00 for delay damages, the total of which award was $563,000.00 more than the amount deposited by the State at the time of the taking on March 28, 1989.

By Judgment entered January 28, 1993, the trial court incorporated the jury's findings and awarded legal interest on the excess funds from March 28, 1989, the date of the taking in this matter, until paid. App. 15-16.

The State appealed two issues to the state appellate court, including the award of legal interest, the State contending that pursuant to a 1988 statute, interest should not have been awarded prior to the date that McMillion filed its Answer on August 16, 1990.

On May 31, 1994, a three-Judge panel of the state Fifth Circuit Court of Appeal reversed the award of legal interest and amended the trial court's Judgment to limit the commencement of interest to August 16, 1990, rather than March 28, 1989. App. 2-13. On August 16, 1994, the Fifth Circuit Court of Appeal denied rehearing in the case. App. 14. On November 29, 1994, the Louisiana Supreme Court, by a 5-2 vote, denied McMillion's Writ Application. App. 1.

REASONS FOR GRANTING THE WRIT

The Louisiana statute at issue denies interest on the compensation due a private landowner whose property has been taken by the state until the landowner answers

the state's petition. Such a result conflicts with the clear command of the Takings Clause that 'just compensation' be provided, and with the prior decisions of this Court that 'just compensation' includes interest from the date of the taking.

Although the statute at issue has recently been amended to cure the constitutional defect, the Louisiana courts have held that this statute governs all takings initiated between September 8, 1988 and August 21, 1992. Unless review is granted by this Court, therefore, the constitutional rights of Petitioner, and thousands of other Louisiana landowners whose property was taken during this time period, have been permanently denied.

Petitioner's property was taken by the State of Louisiana for a public purpose. The Fifth Amendment states: "[N]or shall private property be taken for public use, without just compensation." This provision applies to the states through the Fourteenth Amendment. *See, e.g., Duquesne Light Co. v. Barasch*, 488 U.S. 299, 305, 109 S.Ct. 609, 614 (1989); *Chicago B. & O.R. Co. v. City of Chicago*, 166 U.S. 226, 17 S.Ct. 581 (1896). Therefore, the Fifth Amendment to the United States Constitution, applicable to the State of Louisiana through the Fourteenth Amendment, mandates that Petitioner receive "just compensation."

One hundred years ago, in *Monongahela Navigation Company v. United States*, 148 U.S. 312, 327, 13 S.Ct. 622, 626-27, (1883), the United States Supreme Court emphatically established the judicial branch's province to determine "just compensation" under the Constitution:

> The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry. . . . The right of the legislature of the state, by law, to apply the property of the citizen to the public use, and then to constitute itself the judge in its own case to determine what is the "just compensation" it ought to pay therefor, or how much benefit it has conferred upon the citizen by thus taking his property without his consent or to extinguish any part of such "compensation" by prospective conjectural advantage, or in any manner to interfere with the just powers and province of courts and juries in administering right and justice, cannot for a moment be admitted or tolerated under our Constitution.

This holding is still the law. *See, e.g., Kirby, supra.*

The United States Supreme Court has repeatedly held that "just compensation" must include interest from the date of the taking until paid. *See, e.g., Kirby, supra; Phelps v. United States*, 274 U.S. 341, 344, 47 S.Ct. 611, 612 (1927); *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 304-306, 43 S.Ct. 354, 356 (1923).

In *Seaboard*, the United States Supreme Court held:

> The United States in effect claims that the owner is entitled to no more than the value of the land, as of date of taking to be paid at a later time, when ascertained. . . . It is obvious that the owner's right to just compensation cannot be made to depend upon state statutory provisions. . . . The requirement that "just compensation" shall be paid is comprehensive and includes all elements and no specific command

> to include interest is necessary when interest or its equivalent is a part of such compensation.
>
> 261 U.S. at 304-06 (1923).

In *Phelps*, the United States Supreme Court declared:

> Plaintiffs' property was taken before its value was ascertained or paid. Judgment in 1926 for the value of the use of the property in 1918 and 1919, without more, is not sufficient to constitute just compensation.
>
> 274 U.S. at 344 (1927).

In *Kirby*, the United States Supreme Court reiterated this constitutional mandate:

> [T]he Fifth Amendment does not forbid the Government to take land and pay for it later. [Citation omitted.] But if the disbursement of the award is delayed, the owner is entitled to interest thereon sufficient to ensure that he is placed in as good a position pecuniarily as he would have occupied if the payment had coincided with the appropriation.
>
> 467 U.S. at 10 (1984).

The central issue before the Court in *Kirby* was when interest was due. *Kirby* involved a "straight-taking," where title is not vested in the condemnor unless and until full payment is made, after final judgment in a proceeding to determine just compensation. In *Kirby*, the Court contrasted this procedure with a "quick-taking," whereby "title and right to possession thereupon vest immediately with the deposit of an "amount of money equal to the estimated value of the land," and, after subsequent judicial proceedings, "the owner is awarded the difference (if any) between the adjudicated value of

the land and the amount already received by the owner, plus interest on the difference." *Id.* at 5. The Court explained that interest runs from the date of the taking, i.e., the date "the Government tendered payment and acquired title in the usual course." *Id.* at 16.

The McMillion property was subject to a quick-taking by the State of Louisiana, pursuant to La. R.S. 48:445, which provides: "Upon the deposit of the amount of the estimate in the registry of the court . . . title to the property . . . shall vest in the department." Thus, the taking in this case occurred on the date the deposit was made, and legal interest from that date forward is mandated by the United States Constitution.

The United States Court of Appeal for the Third Circuit recently summarized this constitutional requirement:

> It has been settled since *Chicago, Burlington & Quincy R.Co. v. City of Chicago,* [citation omitted] [1896], that *fourteenth amendment due process includes a substantive prohibition against state takings of private property* without compensation equivalent to express prohibition in the Fifth Amendment against such takings by the federal government. *It has also long been settled that a component of just compensation includes interest for the period during which compensation has been withheld.*
>
> *Bennett v. White,* 865 F.2d 1395, 1406 (3rd Cir.), *cert. denied,* 492 U.S. 920 (1989) (emphasis added).

In *Bennett,* the Third Circuit held that Pennsylvania had taken property and that it must pay interest from the date of the taking as part of the "just compensation" award. *Id.*

On the date of the entry of Judgment in this case, Louisiana law reflected the constitutional mandate and expressly provided that legal interest on an award in a quick-taking case is due from the date of the taking.[1] The trial court applied this statute when it entered Judgment on January 28, 1993. App. 4. The State appealed, contending that the prior statute applied, since the taking occurred while it was in effect, and that interest therefore should run from the date of "legal demand," which was interpreted by the Louisiana Supreme Court in *State, DOTD v. Estate of Davis*, 572 So.2d 39 (La. 1990) to mean the date of the filing of an answer by the landowner.[2] The Court of Appeal agreed with the State and reversed the interest award, holding the 1988 statute applicable and denying Petitioner interest until it filed an Answer. App. 2-13. The Louisiana Supreme Court denied Petitioner's Writ Application to review that ruling. App. 1.

---

[1] Pursuant to La. R.S. 48:455 (1992):
If the amount finally awarded for compensation exceeds the amount deposited, the judgment shall include legal interest on the excess from the date of presentation of the petition as provided in La. R.S. 48:422 until paid, but such interest shall not accrue on any award made for expert fees or attorneys fees prior to judgment.

[2] Pursuant to La. R.S. 48:455 (1988):
If the amount finally awarded for compensation exceeds the amount deposited, the judgment shall include legal interest on the excess from the date of legal demand until paid, but such interest shall not accrue on any award made for expert fees or attorney fees prior to judgment.

The Louisiana statutory scheme in expropriation cases makes any delay in awarding interest especially burdensome to the landowner because La. R.S. 48:451 provides that as soon as an Answer is filed, "either party may, upon *ex parte* motion, request that the matter be docketed for trial . . . not more than 60 days after the filing of the motion, and the trial shall be conducted with preference and with the greatest possible dispatch." Thus, a defendant cannot simply file a quick answer to start the interest "clock" ticking because of the risk of going to trial within 60 days without appraisal reports and proper discovery. Furthermore, the statute at issue denies the landowner interest from the date his property was taken, no matter when he is served or notified of the suit being filed.

In short, it is manifestly a violation of due process to shift the economic loss to the landowner, after his property is taken, for the period of time it takes him to receive notice of the taking, obtain discovery, hire appraisers, and file an answer containing a specific monetary demand, as required by law, while the state enjoys title to the land immediately upon filing of the petition and deposit. This statute thus allows the state to profit from putting a low deposit into the registry of the court, as the state did in this case. It is plainly unconstitutional to so reward the state at the expense of the landowner whose property has been taken.

CONCLUSION

The Petition for Writ of Certiorari should be granted to address the validity of the Louisiana statute depriving Petitioner and other landowners of interest on compensation awards from the date their property is taken, in violation of the Fifth and Fourteenth Amendment prohibition on takings without 'just compensation.'

Additionally, the issue presented here can be resolved summarily, without plenary briefing and argument. It is plain from the court of appeals' opinion that the court did not apply this Court's prior decisions on this issue. Accordingly, this Court may vacate the judgment below and remand the case for consideration and application of this Court's prior decisions in *Kirby v. United States*, *Phelps v. United States*, and *Seaboard v. United States*. Petitioner prays that this Court exercise its discretion to correct the important constitutional error below.

Respectfully submitted,

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The Supreme Court of the State Louisiana

STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

VS. **NO. 94-C - 2345**

McMILLION DOZER, SERVICE, INC.

IN RE: McMillion Dozer Service Inc.; – Defendant(s); Applying for Writ of Certiorari and/or Review; Parish of St. Charles 29th Judicial District Court Div. "C" Number 35,019; to the Court of Appeal, Fifth Circuit, Number 93-CA-0590

November 29, 1994

Denied.

JCW
PFC
JLD
HTL
BJJ

MARCUS, J. not on panel.

HALL, J. would grant the writ.

KIMBALL, J. would grant the writ.

Supreme Court of Louisiana
November 29, 1994

/s/ _____
Clerk of Court
For the Court

STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT	* * * *	NO. 93-CA-590
VERSUS	* *	COURT OF APPEAL
McMILLION DOZER, SERVICE, INC.	* *	FIFTH CIRCUIT
	*	STATE OF LOUISIANA

APPEAL FROM THE TWENTY-NINTH JUDICIAL DISTRICT COURT
PARISH OF ST. CHARLES, STATE OF LOUISIANA
DIVISION "C"
HONORABLE RUCHE J. MARINO, JUDGE

CHARLES GRISBAUM, JR.

JUDGE

MAY 31 1994

(Court composed of Judges H. Charles Gaudin, Charles Grisbaum, Jr., and John C. Boutall, Pro Tempore)

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AMENDED IN PART AND, AS AMENDED, AFFIRMED

In this expropriation matter, the Louisiana Department of Transportation and Development (DOTD) appeals from a jury award finding the DOTD liable for $300,000 in delay damages and the legal interest award from the date of the expropriation petition, rather than from the date of legal demand. We amend in part and, as amended, we affirm.

ISSUES

We are called upon to determine three specific questions:

(1) Whether the jury interrogatory concerning delay damages was sufficient to inform and allow the jury to make a factual finding as to whether delay damages were due;

(2) Whether the evidence supports the jury's finding that delay damages were due; and

(3) Whether the 1993 amended version of La. R.S. 45:455 should be applied retroactively thereby allowing defendant to collect legal interest from the date of the filing of DOTD's petition as opposed to the date of legal demand.

BASIC RECORD FACTS AND PROCEDURAL HISTORY

On March 28, 1989, the DOTD filed suit to expropriate defendant's land in connection with the I-310 interchange project at Airline Highway in St. Charles Parish.

On March 30, 1989, the DOTD deposited $487,952 into the court registry.

Defendant, McMillion Dozer Service, Inc. (McMillion) filed an answer on August 16, 1990 seeking additional compensation to the amount deposited. In addition to requesting additional compensation for the land taken and severance damages, McMillion sought delay damages and business damages.

A jury trial was held January 12-14, 1993 whereby the jury found that the DOTD owed $376,000 for the land taken, $375,000 for severance damages and $300,000 for delay damages. The jury did not award any amount for the alleged business damages. The trial court's judgment incorporated the jury's award and further awarded legal interest on the difference between the amount previously deposited and the amount owed. The interest was to be computed from March 28, 1989, which was the date of the filing of DOTD's expropriation petition. Thus, this appeal ensued.

ISSUE ONE

STANDARD OF REVIEW

Our jurisprudence tells us that interrogatories that are misleading or confusing may constitute reversible error. However, the manifest error standard must be applied in determining whether an interrogatory is so inadequate that the jury is precluded from reaching a verdict based on correct law and facts. *Doyle v. Picadilly Cafeterias,* 576 So.2d 1143 (La. App. 3d Cir. 1991).

ANALYSIS

The following interrogatory form was submitted to the jury:

SPECIAL JURY INTERROGATORIES

1. What amount of money do you find is just compensation for the land taken by the DOTD from McMillion Dozer Service, Inc.?

$376,000.00

2. What amount of money do you find is just compensation for the severance damages caused by the DOTD's taking to the remainder of land owned by McMillion Dozer Service, Inc.?

$375,000.00

3. What amount of money do you find is just compensation for the delay damages suffered by McMillion Dozer Service, Inc. as a result of its property being taken out of commerce, because of the DOTD's actions, for an unreasonable or excessive length of time?

$300,000.00

4. What amount of money do you find is just compensation for the business damages to McMillion Dozer Service, Inc. as a result of the DOTD's taking?

$0.00

The DOTD only appeals the language of the third interrogatory claiming that the wording does not allow the jury to make a factual finding of whether delay damages are due but rather dictates to the jury to fill in the amount owed for such damages.

Prior to jury deliberations, the DOTD objected to the interrogatory form on the ground that question Nos. 3 and 4 should not be separate and distinct questions because question No. 2, addressing severance damages, was sufficient to cover delay and business damages. When a party fails to object to the jury interrogatory form before the jury retires, the party waives his right to raise the objection on appeal. *Horton v. McCrary,* 620 So.2d 918 (La. App. 3d Cir. 1993). While we question whether appellant's objection was sufficient to preserve its right to appeal the issue of the wording of the interrogatories, we will nonetheless address it.

The record shows the trial judge instructed the jury several times regarding delay damages. The trial judge stated, "Further, the State must also pay McMillion for any damages it incurred prior to the expropriation in 1989 if you find that its property was taken out of commerce for an unreasonable length of time prior to the expropriation."

The trial judge also advised the jury of the defendant's burden of proof concerning delay damages, as follows:

> To recover delay damages, McMillion must prove that it is more like [sic] than not that its property was effectively taken out of commerce for an unreasonable length of time due to the State's actions.
>
> If McMillion's property was taken out of commerce for an unreasonable or excessive length of time because of the State's actions,

> then McMillion is entitled to recover all damages it sustained resulting from such actions by the State.

We cannot say that in the totality of the jury instructions and the jury interrogatory form the jury misunderstood the issues before them. It is clear from the jury's findings they understood that they must first make a factual finding as to whether such damages were due. In addition, all four interrogatories are worded the same. The first two categories, the value of the land and severance damages, are owed as a matter of law. The latter two categories, delay and business damages, are due only if the facts indicate that such damages were suffered. *State DOTD v. Brookhollow of Alexandria*, 578 So.2d 558 (La. App. 3d Cir. 1991), *writ denied*, 581 So.2d 709, 710 (La. 1991). We find the jury necessarily made factual determinations when it decided delay damages were due while business damages were not. Ergo, we see no error.

ISSUE TWO

STANDARD OF REVIEW

Now, we will be reviewing the factual findings of the jury which should not be disturbed absent manifest error. *Arceneaux v. Domingue*, 365 So.2d 1330 (La. 1978).

ANALYSIS

The DOTD appeals the jury's award for delay damages on the ground that the evidence does not support such a finding.

La. Const. art. I, § 4 provides, in pertinent part, "In every expropriation, a party has the right to trial by jury to determine compensation, and the owner shall be compensated to the full extent of his loss." The phrase "to the full extent of his loss" allows compensation in areas that were not previously not compensable, namely economic loss. *State, Dept. of Transp. v. Maynard*, 565 So.2d 532 (La. App. 4th Cir. 1990), *writ denied*, 568 So.2d 1079-80 (La. 1990), overruled in part by *State through DOTD v. Estate of Davis*, 572 So.2d 39 (La. 1990). We previously held that damages caused by property being taken out of commerce for an unreasonable length of time pending expropriation are recoverable in an expropriation action. *West Jefferson Levee Dist. v. Coast Quality Constr. Corp.*, 620 So.2d 319 (La. App. 5th Cir. 1993).

Also, in *West Jefferson Levee Dist.*, supra, at 333, we set forth five factors to be considered in maintaining an award for delay damages:

> First, was there a delay in the project? Second, was there a reasonable expectation that the project would receive a permit? Third, what was the period of delay? Fourth, who is legally responsible for the delay? And finally, what is a fair and reasonable calculation of the loss suffered as a result of the delay?

The property owner has the burden of proving that he suffered damages due to the delay in expropriating. He must show his loss through a preponderance of the evidence. *State DOTD v. Brookhollow of Alexandria*, supra.

We find sufficient evidence presented by defendant-appellee to support an award for delay damages. Mr. McMillion, president and 90% shareholder of McMillion,

testified that he bought the property for the purpose of expanding his business on part of the property and selling the remainder as industrial lots. He learned in 1984 he would not be able to directly access Airline Highway from his property due to the future I-310 project. Mr. McMillion stated that he had problems selling the land between 1984 and 1989, the year the property was formally expropriated. He also testified he delayed developing the land between 1984 and 1989 because he was uncertain as to what was going to happen, and he did not want to build only to have it taken away through expropriation. For a period of three to four years, Mr. McMillion filled the land because, at the time he purchased the property, it was classified as wetlands.

Appellee's expert witnesses testified that after the "control of access," the property would not sell. Appellee's experts, Mr. Guice and Ms. Felts, valued the delay damages, caused by what they opined as the property being taken out of commerce, by valuing the property as it would have sold in 1984, multiplying it by the interest rate and then multiplying that number by the 5.15 years that the land was "taken out of commerce." The total delay damages were estimated between $1,240,000 and $1,253,000. However, the jury only awarded $300,000. In addition, both experts testified that appellee's land was taken out of commerce for an unreasonable and excessive length of time.

The above evidence indicates that appellee's plans to develop the land were delayed during the time he was notified that he could not have access until the formal expropriation. He was in a state of limbo, not knowing what was going to happen. Furthermore, when appellee

purchased the land in 1978, there was no indication he would be unable to directly access Airline Highway. Therefore, there was a reasonable expectation he would eventually be able to build his business, sell off the remaining lots, and directly access Airline Highway which was necessary for his business. The evidence indicates there was a five-year delay period, and the DOTD was responsible for the delay because they denied direct access in 1984 and did not formally expropriate the land until 1989.

From this factual scenario, we conclude appellee proved his case by a preponderance of the evidence. We note that throughout the trial, the DOTD objected to evidence relating to delay damages on the basis that such damages were not compensable in an expropriation proceeding. Consequently, the DOTD did not offer any evidence to rebut testimony regarding delay damages. However, the law, as stated above, indicates that such damages are in fact compensable in an expropriation proceeding. Because there was no contradictory evidence as to delay damages, we cannot say that the jury was manifestly erroneous in relying on the evidence presented and awarding delay damages. The jury obviously found the defense witnesses credible, and we cannot disturb such a determination unless there is objective evidence that contradicts the witnesses' stories or their testimony is so internally inconsistent or implausible that a reasonable fact finder would not credit the witnesses' stories. *Rosell v. Esco,* 549 So.2d 840 (La. 1989).

We also note that appellant is correct in stating that mere inconveniences do not warrant delay damages. *Constance and Cleary Bicycle v. State, through DOTD,* 626 So.2d

1151 (La. 1993); *State through DOTD v. Chambers Investment Co.*, 595 So.2d 598 (La. 1992). However, we do not find that the jury was manifestly erroneous in finding that appellee suffered actual damages as opposed to mere inconvenience.

ISSUE THREE

Since 1988, La. R.S. 48:455 has been amended twice. Pre-1988, the statute read

> The judgment rendered therein shall include, as part of the just compensation awarded, legal interest on the amount finally awarded as of the date title vests in the plaintiff to the date of payment, but interest shall not be allowed on so much thereof as has been deposited in the registry of the court.

This allowed the landowner to collect legal interest at the time of the taking.

However, in 1988, it was amended by Act 882 to read as follows: "If the amount finally awarded for compensation exceeds the amount deposited, the judgment shall include legal interest on the excess from the date of legal demand until paid, but such interest shall not accrue on any award made for expert fees or attorney fees prior to judgment." This amended version only allowed the landowner to collect legal interest from the time of legal demand, which was interpreted to mean the date of the answer, as opposed to the time of the taking, which was when compensation was deposited into the registry of the court. It is this version of La. R.S. 48:455 that was in effect at the time this suit was filed.

In 1992, the statute was again amended by Act 483 and put into effect January 1993. The statute currently reads

> If the amount finally awarded for compensation exceeds the amount deposited, the judgment shall include legal interest on the excess from the date of presentation of the petition as provided in R.S. 48:422 until paid, but such interest shall not accrue on any award for expert fees or attorney fees prior to judgment.

In *State through DOTD v. Estate of Davis,* supra, the Louisiana Supreme Court held that the 1988 amendment of La. R.S. 48:455 affected the substantive rights of a landowner in an expropriation proceeding and, therefore, was not to be applied retroactively, meaning the version of the statute in effect at the time the lawsuit was filed should apply. The Louisiana Supreme Court further held that "[l]egal interest is a matter of substantive law and a change in the law that alters an award of legal interest should not be given retroactive effect unless the legislature so provides." *Davis,* supra, at 44 (citations omitted).

In adopting the findings of the jury, the trial court awarded legal interest from March 28, 1989 on the difference between the award and the amount initially deposited. The DOTD appeals on the grounds that the 1988 amended version of La. R.S. 48:455, which was the version that was in effect at the time the petition was filed and which orders legal interest to be computed from the time of legal demand, should apply rather than the current 1993 version, which allows legal interest to be computed from the filing of the petition. See *State, DOTD v. Tatman,* 587 So.2d 797 (La. App. 3d Cir. 1991).

In light of the Louisiana Supreme Court's decision in *Estate of Davis*, supra, which held that legal interest is a substantive matter, we hold that the 1992 amendment affecting legal interest is a substantive change and, therefore, the 1993 version of La. R.S. 48:455 cannot be retroactive. Accordingly, the trial court erred, and the legal interest should run from the date of the legal demand, which was August 16, 1990.

For the reasons assigned, the trial court's judgment dated January 28, 1993 is hereby affirmed, except that part of the trial court's judgment, which states "legal interest on the foregoing amounts [is to be calculated] from March 28, 1989 until paid," is to be amended to read "legal interest on the foregoing amounts is to be calculated from August 16, 1990 until paid." The parties to this appeal are to bear their respective costs.

AMENDED IN PART AND, AS AMENDED, AFFIRMED

COURT OF APPEAL, FIFTH CIRCUIT
STATE OF LOUISIANA

Clerk's Office, Gretna AUG 16 1994

DEAR SIR:

REHEARING WAS THIS DAY REFUSED
IN THE CASE ENTITLED

State of La., D.O.T.D. v. McMillion Dozer Service, Inc.,

No. 93 CA 590

Very truly yours,

PETER J. FITZGERALD, JR., Clerk

TWENTY-NINTH JUDICIAL DISTRICT COURT

PARISH OF ST. CHARLES

STATE OF LOUISIANA

NO. 35,019 DIVISION "C"

STATE OF LOUISIANA,
DEPARTMENT OF TRANSPORTATION
AND DEVELOPMENT

VERSUS

MCMILLION DOZER SERVICE, INC.

FILED: _____ _____
DEPUTY CLERK

JUDGMENT

This expropriation suit was tried before a jury on January 12, 13 and 14, 1993. Considering the verdict returned by the jury, the stipulations of counsel, the pleadings and evidence submitted, and the law;

IT IS ORDERED that judgment be and it is hereby entered in favor of McMillion Dozer Service, Inc. and against the State of Louisiana, Department of Transportation and Development, in the principal amount of $563,048.00, comprised of $77,000.00 for the property taken, $186,048.00 for severance damages, and $300,000.00 for delay damages, plus legal interest on the foregoing amounts from March 28, 1989 until paid.

IT IS FURTHER ORDERED that McMillion Dozer Service, Inc. be and it hereby is awarded statutory attorneys' fees in the amount of twenty-five (25%) percent of the foregoing, expert witness fees as set by the Court in the amounts of $15,000 for Mr. Fred Guice and $15,000 for

Ms. Jean Felts, exhibit costs of Court in the amount of $8,000, and all court costs established by the Clerk of Court, plus legal interest on the foregoing amounts from this date until paid.

HAHNVILLE, LOUISIANA, this 20th day of January, 1993.

/s/ _____
JUDGE

COURT OF APPEAL

FIFTH CIRCUIT

STATE OF LOUISIANA

NO. 93-CA-590

STATE OF LOUISIANA,
DEPARTMENT OF TRANSPORTATION
AND DEVELOPMENT

VERSUS

MCMILLION DOZER SERVICE, INC.

ON APPEAL FROM THE
TWENTY-NINTH JUDICIAL DISTRICT COURT,
PARISH OF ST. CHARLES,
HONORABLE RUCHE J. MARINO,
DISTRICT JUDGE, SECTION "C"
TRIAL BY JURY

**ORIGINAL BRIEF ON BEHALF OF
APPELLEE MCMILLION DOZER SERVICE, INC.**

CIVIL PROCEEDING

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Randall A. Smith, 2117
Scott T. Whittaker, 14494
of
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B. The Award Of Legal Interest Was Proper And Should Not Be Disturbed On Appeal.

1. McMillion Has A Constitutional Right To Interest From The Date Its Property Was Taken And Title Vested In The DOTD.

McMillion is clearly entitled to interest from the date of the taking pursuant to the Fifth and Fourteenth Amendments of the United States Constitution.

The Fifth Amendment states: "[N]or shall private property be taken for public use, without just compensation." According to the United States Supreme Court, this provision applies to the states through the Fourteenth Amendment. *See, e.g., Duquesne Light Co. v. Barasch,* 488 U.S. 299, 305, 109 S.Ct. 609, 614 (1989); *Pennell v. City of San Jose,* 485 U.S. 1, 19, 108 S.Ct. 849, 861 (1988) (Scalia, J. con.) ("The Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment . . . provides that 'private property [shall not] be taken for public use, without just compensation' "); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, Cal.,* 482 U.S. 304, 311, n.4, 107 S.Ct. 2378, 2383 n.4 (1987) ("The Fifth Amendment provides 'nor shall private property be taken for public use, without just compensation,' and applies to the States through the Fourteenth Amendment."); *Chicago B. & Q. R. Co. v. City of Chicago,* 166 U.S. 226, 17 S.Ct. 581 (1896) (The taking of private property by a state without "just compensation" violates the "due process" clause of the Fourteenth Amendment).

McMillion's property was taken by the State of Louisiana for a public purpose. Therefore, the Fifth Amendment to the United States Constitution, applicable to the State of Louisiana through the Fourteenth Amendment, mandates that McMillion receive "just compensation."

One hundred years ago, in *Monongahela Navigation Company v. United States*, 148 U.S. 312, 327, 13 S.Ct. 622, 626-27, (1893), the United States Supreme Court emphatically established the judicial branch's province to determine "just compensation" under the Constitution:

> The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry. . . . the right of the legislature of the state, by law, to apply the property of the citizen to the public use, and then to constitute itself the judge in its own case to determine what is the "just compensation" it ought to pay therefor, or how much benefit it has conferred upon the citizen by thus taking his property without his consent or to extinguish any part of such "compensation" by prospective conjectural advantage, or in any manner to interfere with the just powers and province of courts and juries in administering right and justice, cannot for a moment be admitted or tolerated under our Constitution.

This holding is still the law. *See, e.g., Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 104 S.Ct. 2187 (1984).

The United States Supreme Court has repeatedly held that "just compensation" must include interest from the date of the taking until paid. *See, e.g., Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 9-11, 104 S.Ct. 2187, 2194 (1984); *Phelps v. United States*, 274 U.S. 341, 344, 47

S.Ct. 611, 612 (1927); *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 304-306, 43 S.Ct. 354, 356 (1923).

In *Seaboard*, the United States Supreme Court held:

> The United States in effect claims that the owner is entitled to no more than the value of the land, as of date of taking, to be paid at a later time, when ascertained. . . . It is obvious that the owner's right to just compensation cannot be made to depend upon state statutory provisions. . . . The requirement that "just compensation" shall be paid is comprehensive and includes all elements and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation.
>
> 261 U.S. at 304-06 (1923).

In *Phelps*, the United States Supreme Court declared:

> Plaintiffs' property was taken before its value was ascertained or paid. Judgment in 1926 for the value of the use of the property in 1918 and 1919, without more, is not sufficient to constitute just compensation.
>
> 274 U.S. at 344 (1927).

In *Kirby*, the United States Supreme Court reiterated its position:

> [T]he Fifth Amendment does not forbid the government to take land and pay for it later. [Citation omitted.] But if the disbursement of the award is delayed, the owner is entitled to interest thereon sufficient to ensure that he is placed in as good a position pecuniarily as he would

> have occupied if the payment had coincided with the appropriation.
>
> 467 U.S. at 10 (1984).

The Central issue before the Court in *Kirby* was when interest was due. *Kirby* involved a "straight-taking," where title is not vested in the condemnor unless and until full payment is made after final judgment in a proceeding to determine just compensation. In *Kirby*, the Court contrasted this procedure with a "quick-taking," whereby "title and right to possession thereupon vest immediately with the deposit of an "amount of money equal to the estimated value of the land," and, after subsequent judicial proceedings, "the owner is awarded the difference (if any) between the adjudicated value of the land and the amount already received by the owner, plus interest on the difference." *Id.* at 5. The Court explained that interest runs from the date of the taking, i.e., the date "the Government tendered payment and acquired title in the usual course." *Id.* at 16.

The McMillion property was subject to a quick-taking by the State of Louisiana, pursuant to La. R.S. 48:455, which provides: "Upon the deposit of the amount of the estimate in the registry of the court . . . title to the property . . . shall vest in the department." Thus, the takings in this case occurred on the dates the deposits were made, and legal interest from those dates forward is mandated by the Constitution.

The United States Court of Appeal for the Third Circuit recently summarized this constitutional mandate:

> It has been settled since *Chicago, Burlington & Quincy R.Co. v. City of Chicago,* [citation omitted] [1896], that *fourteenth amendment due process includes a substantive prohibition against state takings of private property* without compensation equivalent to express prohibition in the Fifth Amendment against such takings by the federal government. *It has also long been settled that a component of just compensation includes interest for the period during which compensation has been withheld.*
>
> *Bennett v. White,* 865 F.2d 1395, 1406 (3rd Cir.), *cert. denied,* 492 U.S. 920 (1989) (emphasis added).

In *Bennett,* the Third Circuit held that Pennsylvania had taken property and that it must pay interest from the date of the taking as part of the "just compensation" award. *Id.*

In addition to violating the United States Constitution, the 1988 amendment violates Louisiana Constitution Article I, Section 4, which provides that "the owner shall be compensated to the full extent of his loss." *See, e.g., Department of Transportation and Development v. Stein,* 570 So.2d 513, 515 (La. App. 5th Cir. 1990) (1988 amendment ignores "the concept of 'just compensation' required by Article I, Section 4").

CONCLUSION

For all of the above and foregoing reasons, the Judgment of the trial court should be affirmed. The DOTD put on no evidence at the trial below to contradict the testimony of Mr. McMillion, the DOTD documents, or the opinions of both of McMillion's experts that McMillion's property was taken out of commerce for an unreasonable length of time as a result of the DOTD's actions. Therefore, the jury's decision to award $300,000 in delay damages, pursuant to unambiguous and uncontested jury instructions, cannot be considered manifestly erroneous and cannot be disturbed on appeal. Finally, the Judge correctly awarded legal interest pursuant to the statute in effect at the time of the Judgment and the requirements of the Louisiana and United States Constitutions.

Respectfully submitted,

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TWENTY-NINTH JUDICIAL DISTRICT COURT

PARISH OF ST. CHARLES

STATE OF LOUISIANA

NO. 35,019 DIVISION "C"

STATE OF LOUISIANA,
DEPARTMENT OF TRANSPORTATION
AND DEVELOPMENT

VERSUS

MCMILLION DOZER SERVICE, INC.

FILED: _____ _____

DEPUTY CLERK

MEMORANDUM IN SUPPORT OF JUDGMENT

NOW INTO COURT, through undersigned counsel, comes McMillion Dozer Service, Inc. made defendant in the captioned matter, who submits this memorandum in support of the judgment submitted herewith to reflect the proper amounts to which it is entitled after the trial by jury culminating on January 14, 1993 in the captioned matter.

The jury awarded a total of $1,051,000.00, from which $487,952.00 must be deducted as having been the amount deposited with the registry of the Court on March 28, 1989 by the plaintiff Department of Transportation and Development. That leaves a principal amount of judgment of $563,048.00, comprised of $77,000.00 for the property taken (after deducting the amount deposited therefor), $186,048.00 for severance damages (after deducting the amount deposited therefor), and delay damages in the amount of $300,000.00. Legal interest on

the foregoing amounts should be paid from March 28, 1989. La. R.S. 48:455 (1992); *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10-11, 104 S.Ct. 2187, 2194 (1984).

McMillion also requests that it be awarded statutory attorneys' fees of 25% of the principal and interest awarded and specifically notes that counsel for the Department of Transportation and Development has stipulated that McMillion is so entitled to that amount of attorneys' fees.

In addition, McMillion is entitled to an award for expert witness fees to be set by the Court for Mr. Fred Guice and for Ms. Jean Felts (whose complete bills are attached as Exhibits "A" and "B"), plus exhibit costs for the survey which was introduced as Exhibit 7 and for the remaining exhibits (which costs are shown by Exhibits "C" and "D" attached hereto). All of these amounts should be taxed as costs under the authority of La. R.S. 13:3666 (Expert witness fees) and *Westwego Canal & Terminal Co. v. Louisiana Highway Commission*, 200 La. 990, 9 So.2d 389, 392-3 (La. 1942) (expenses incurred for surveys, maps and plats necessary to enable the party to make out his case are taxable as costs).

Finally, McMillion is also entitled to an award for all court costs established by the Clerk of Court, plus legal interest on the amounts awarded for attorneys' fees,

expert fees and all costs from the date of this judgment until paid.

Respectfully submitted,

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Attorneys for
McMillion Dozer Service, Inc.

CERTIFICATE

I hereby certify that a copy of the above and foregoing Memorandum in Support of Judgment has been served upon all counsel of record by telecopy and by placing same in the United States mail, postage prepaid and properly addressed, this 25th day of January, 1993.

/s/ Randall A. Smith
Randall A. Smith

Supreme Court, U.S.
FILED
APR 14 1995
OFFICE OF THE CLERK

No. 94-1446

In The

Supreme Court of the United States

October Term, 1994

McMILLION DOZER SERVICE, INC.,

Petitioner,

v.

STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Louisiana

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RONALD J. BERTRAND
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QUESTIONS PRESENTED

I.

Was a Louisiana statute, effective between 1988 and 1992, which provided for interest to be paid on an award of excess compensation from the date judicial demand was made violative of the Fifth Amendment to the U.S. Constitution?

II.

Did the entire statutory and constitutional framework for compensation for the taking of property between 1988 and 1992 in Louisiana violate the Fifth Amendment to the U.S. Constitution?

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STATEMENT OF THE CASE

On March 28, 1989 the Louisiana Department of Transportation & Development filed an expropriation suit against McMillion Dozer Service, Inc. pursuant to the authority which it has under Title 48 of the Louisiana Revised Statutes, commonly known as the Quick Taking Statute. In accordance with the provisions of that statute, the State deposited the sum of $487,952.00 into the registry of the court as an estimate of just compensation for the land taken and severance damages to the defendant's remaining land. On August 16, 1990 the defendant filed an answer requesting additional compensation for the property expropriated, severance damages to its remaining land and delay damages for the 5 year period preceding the expropriation.

The case was tried before the jury from January 12 through 14, 1993. The jury awarded additional compensation above the deposit in the total amount of $563,048.00, which was divided into the following categories:

$ 77,000.00	–	additional compensation for the property taken
$186,048.00	–	additional compensation for severance damages
$300,000.00	–	compensation for delay damages

The judgment incorporating the jury award provided for legal interest on these amounts from the date the expropriation suit was filed, March 28, 1989, until paid. The State filed an appeal to the appropriate appellate court challenging the jury award for delay damages and requesting that the legal interest on the excess awards be

amended to run from the day the answer was filed according to the statute in effect at the time the suit was filed. The State did not appeal the additional awards for the property expropriated nor severance damage to the remaining property of the defendant. The Fifth Circuit Court of Appeal for Louisiana refused to grant the relief sought on the issue of the delay damages, but did amend the Trial Court judgment to provide that interest on the additional amounts should only run from the date the answer was filed, August 16, 1990, rather than the date the expropriation suit was filed, March 28, 1989. Applications to the Louisiana Supreme Court by both the State of Louisiana on the delay damage issue and by McMillion on the interest issue were denied.

SUMMARY OF ARGUMENT

Petitioner argues that the Fifth Amendment to the U.S. Constitution absolutely requires the payment of interest on excess compensation awards from the date that an expropriation suit is filed in formal expropriation proceedings. The State of Louisiana has always provided for the payment of legal interest on awards for excess compensation above that deposited in the registry of the court at the time the expropriation suit is filed. For the 4 years between 1988 and 1992, however, the State decreed by statute that legal interest on such awards would begin to run only from the date written demand for such awards was filed by the landowner rather than from the date the State filed its expropriation suit. The State contends that this was not an arbitrary restriction on interest

because legal interest on other types of awards traditionally begins from the date of judicial demand and because the landowner could file the answer containing the demand for additional compensation at any time after the expropriation suit was filed. The State contends that this was not an infringement of any right to interest which may exist under the Fifth Amendment to the U.S. Constitution.

Even if this Court were to feel that the Fifth Amendment requires interest on compensable excess awards from the date an expropriation suit is filed, the State of Louisiana contends that this landowner has been paid compensation in an amount which far exceeds anything it could have recovered under the Fifth Amendment to the U.S. Constitution as applied by the Federal courts. The reason for this is that the award of $300,000.00 for delay damages for the 5 year period prior to the formal expropriation by the State of Louisiana in 1989 was not compensable under Federal law. Had this been an expropriation proceeding brought in federal court pursuant to the Fifth Amendment to the U.S. Constitution, the only recovery by the landowner would have been for the property actually expropriated and severance damages to its remaining land. There would have been no recovery for delay damages. Thus, the total amount recovered by the landowner under the Louisiana scheme of compensation pursuant to its constitution and statutory authority far exceeds anything the landowner could have recovered in federal court under the provisions of the Fifth Amendment to the U.S. Constitution.

The State would also point out to this Court that the landowner failed to follow the procedure necessary to raise this issue in the Louisiana courts and that the issue is now moot because the interest statute was amended in 1992 to return the beginning date for the payment of interest to its pre-1988 status. Therefore, no significant federal question is raised by this application which needs consideration by this Court.

ARGUMENT

By this writ application, McMillion Dozer seeks to have this Court restore the legal interest on the excess compensation awarded between the date the expropriation suit was filed and the date the answer demanding additional compensation was filed, a period of approximately 16 1/2 months. Petitioner argues that the Fifth Amendment to the U.S. Constitution mandates the payment of legal interest from the date of taking. The primary case relied on by petitioner is *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 104 S. Ct. 2187 (1984). For several reasons, *Kirby* is not dispositive of the issue raised by petitioner; indeed, the specific issue raised by this writ application, i.e. whether or not interest on compensation may be paid from date of demand as opposed to date of taking, was not addressed in *Kirby*.

Kirby involved a "straight-condemnation" proceeding wherein a suit was filed to indicate the interest in the United States in taking property without actually taking title to the property unless the government subsequently

decided to do so after a trial on the issue of compensation. In the instant case, the State of Louisiana actually acquired title to the property upon the filing of the petition and the deposit of the estimate of just compensation in the registry of the court. The procedures involved in the two cases are different. The narrow issue involved in *Kirby* was set forth by this Court as follows:

> "We granted certiorari to resolve a conflict in the circuits regarding a date on which the taking, in a 'straight condemnation' proceeding should be deemed to occur and the constitutional obligation of the United States to pay interest on the adjudicated value of the property." *Kirby* at p. 10.

In the case at bar, a substantial deposit was made on the date that the expropriation petition was filed. When the Court of Appeal rendered its decision, legal interest was paid on the excess amount of compensation awarded for the property taken and severance damages to the remainder from the date the answer was filed until the date payment was made. When the Supreme Court ultimately refused the State's writ application on the issue of the award for delay damages, an additional deposit was made to cover this award of $300,000.00 plus legal interest thereon from the date the answer was filed until the payment was made. Thus, substantial amounts of interest have been paid on the excess awards of compensation.

Petitioner is not satisfied, however, and claims that it is constitutionally mandated to receive interest on these awards from the date the State filed its expropriation suit. The specific issue raised by the application, therefore, would seem to be whether or not the State, while

acknowledging an obligation to pay interest, has the discretion to set a reasonable date on which the interest is to begin running.

Under the Quick Taking statutory scheme in Louisiana, a deposit of estimated compensation is made at the time the expropriation suit is filed. If no answer requesting additional compensation is timely filed, the State may obtain a judgment indicating that the initial deposit is judicially declared to be just compensation to the landowner. In the absence of an answer, therefore, the possibility of legal interest on an excess award never arises.

In 1988, the Louisiana Legislature amended the interest statute to indicate that legal interest on an excess award would not begin to accrue until the landowner filed such an answer setting forth a judicial demand for additional compensation, thereby putting the issue of additional compensation on the table. This statute in no way limited the right of the landowner to immediately file an answer seeking additional compensation, but merely sought to provide an incentive for a landowner who felt aggrieved by the amount of the deposit to put the question of compensation at issue without undue delay. Petitioner argues that this somehow placed an undue burden on the landowner because the landowner needed time to "put his case together" before filing such an answer. This complaint ignores the fact that the landowner knows well in advance of the actual filing of the expropriation suit that his property will be taken. Before the suit is filed, the State is statutorily bound to obtain estimates of compensation from qualified appraisers and to make an offer to the landowner based on those appraisals. As a practical matter, therefore, the landowner

has general knowledge of the project at the time that the project is announced, more specific knowledge at the time the appraisals are being made, and very specific knowledge of how much is being offered when a formal offer is made to him based on those appraisals. During this entire time, especially after the specific offer is made to him, he is able to obtain the services of expert personnel to assist him in evaluating his situation. Even if he does not do these things before the State files its suit, he can still file an answer immediately thereafter and the Courts will give him a reasonable time to prepare his case before trial.

The State has acknowledged that interest is due on excess compensation awarded over the amount of the original deposit and recognizes that there must be some reasonable starting point for the interest to begin accruing. For instance, it would not be reasonable for the State to statutorily decree that interest will begin to run one year from the date of taking, no matter whether an answer is filed prior to that time or not. Considering the fact that the landowner may file an answer setting compensation at issue at anytime after the expropriation suit is filed, and further considering that legal interest traditionally begins to run from date of judicial demand in other types of litigation, the Louisiana statute in effect from 1988 to 1992 was not arbitrary in setting the date of judicial demand for additional compensation as the beginning date for the tolling of interest.

It is unknown whether or not other states have similar provisions, but this writer has been unable to find any other federal cases which raise this identical issue. It appears that petitioner could not find any cases raising

the identical issue either since none of the cases cited in its application are directly on point.

IS PETITIONER ENTITLED TO ADDITIONAL RECOVERY UNDER AMENDMENT V TO THE U.S. CONSTITUTION?

Even if this Court believes that interest on excess compensation should begin to accrue from the date of taking, which was the date on which the expropriation suit was filed in this case, it is submitted that McMillion Dozer has received compensation, including interest, under the Louisiana constitutional and statutory scheme which far exceeds the amount of compensation and interest to which it would have been entitled under the Fifth Amendment to the U.S. Constitution. While the award for the property expropriated and severance damages to the remaining property would be compensable under the Fifth Amendment to the U.S. Constitution, the award of $300,000.00 for delay damages (as well as the legal interest paid thereon from the date of answer through the date of payment) would not have been compensable under that amendment according to the decisions of this Court and other Federal Courts. These damages were awarded for the 5 year period *prior* to the formal expropriation in 1989 despite the clear evidence in the record that the property continued to be utilized by McMillion Dozer Services in the same manner during that period which it had been prior to that time.

This Court recently re-examined what governmental activities would constitute a "taking" other than the actual formal expropriation of property. *Lucas v. South Carolina Coastal Council,* 112 S. Ct. 2886 (1992). While the

Lucas case and its predecessors dealt with regulatory takings, the rationale should be the same for other governmental activities such as pre-expropriation activities which indirectly impact landowners. In *Lucas* this Court again repeated that it has avoided any set formula for determining when a government regulation or activity has gone too far, but recognized the two basic categories that have triggered the awarding of compensation in these situations.

> "We have, however, described at least two discreet categories of regulatory action as compensable without case specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical invasion of his property. In general, at least with regard to permanent invasions, no matter how minute the intrusions, and no matter how weighty the public purpose behind it, we have required compensation." *Lucas,* supra at p. 2893.

> "The second situation in which we have found the categorical treatment appropriate is where regulation denies all economically beneficial productive use of land . . . As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interest or denies an owner economically viable use of his land'." *Lucas,* supra at p. 2893.

In the instant case, there was no physical invasion of petitioner's property prior to the actual expropriation. Thus, there was no pre-expropriation taking under the first category referred to above. Neither was there a pre-expropriation taking under the second situation

described above. The State of Louisiana has a legitimate state interest in the planning of construction projects. This planning did not deny the petitioner economically viable use of its land since it continued to utilize the land for the same purpose and in the same manner as it did prior to that time. Oddly enough there was an argument made in the *Kirby* case relied on by petitioner similar to the claim for delay damages awarded and paid herein. In denying that claim, this Court said:

> "The filing of a complaint in condemnation and a notice of lis pendens, petitioner contends, has the effect of preventing the owner of unimproved land thereafter from making any profitable use of it, or of selling it to another private party. At the same time, the owner remains liable for property taxes. Such a thoroughgoing abrogation of the owner's rights, petitioner submits, surely constitutes a taking as soon as the abrogation is effective, regardless of when the land is officially appropriated under the terms of the statutes." *Kirby* at p. 12.

> "However, we do not find, prior to the payment of the condemnation award in this case, an interference with petitioner's property interest severe enough to give rise to a taking under the foregoing theory. Until title passed to the United States, petitioner was free to make whatever use it pleased of its property. The government never forbade petitioner to cut the trees on the land or to develop the tract in some other way. Indeed, petitioner is unable to point to any statutory provision that would have authorized the government to restrict petitioner's usage of the property prior to payment of the award.

> "Nor did the government abridge petitioner's right to sell the land if it wished. It is certainly possible, as petitioner contends, that the initiation of condemnation proceedings, publicized by the filing of a notice of lis pendens, reduced the price that the land would have fetched, but impairment of the market value of real property incident to otherwise legitimate government action ordinarily does not result in a taking. . . . At least in the absence of an interference with an owner's legal right to dispose of his land, even a substantial reduction of the attractiveness of the property to potential purchasers does not entitle the owner to compensation under the Fifth Amendment." *Kirby*, supra at p. 13.

Thus, while these delay damages may have been compensable under Louisiana's constitutional and statutory scheme of compensation, they clearly would not have been recoverable under the Fifth Amendment of the U.S. Constitution. Even if petitioner would have been entitled under the Fifth Amendment to the U.S. Constitution to additional interest for the 16 1/2 months between the date of taking and the date it filed its answer, this legal interest (approximately 16%) on the additional award for the property expropriated and severance damages (a total of $263,048.00) was more than exceeded by the $300,000.00 (plus legal interest of $116,266.00 on that amount), paid for the delay damages which would not have been recoverable under the Fifth Amendment to the U.S. Constitution. If, therefore, one looks at the totality of the amount recovered by McMillion Dozer under Louisiana law, it far exceeds the amount that would have been recovered by McMillion Dozer pursuant to the Fifth Amendment to the U.S. Constitution. McMillion Dozer

seems to argue that it should recover under both; however, the only possible constitutional issue for this Court to consider is whether or not McMillion has received compensation for the taking of its property in an amount sufficient to satisfy the constitutional requirements of the Fifth Amendment to the U.S. Constitution. Clearly it has!

PROCEDURAL AND JURISDICTIONAL DEFICIENCIES

Petitioner argues to this Court that it raised this issue in the Louisiana courts. It fails to inform this Court, however, that it failed to raise the issue in the proper manner in the Louisiana courts. The Attorney General for the State of Louisiana was never made a party to the proceeding in Louisiana State courts as required by Louisiana Code of Civil Procedure Article 1880 and Louisiana Revised Statute 13:4448. In *Lemire v. Nopsi*, 458 So. 2d 1308 (La. 1984), the Louisiana Supreme Court said:

> "Further, where the constitutionality of a statute is at issue, the attorney general must be served and is an indispensable party. La. C.C.P. Art. 1880. The attorney general was not served nor was he made a party to this action. Accordingly, we do not reach the issue of the constitutionality of La. R.S. 13:5105." *Lemire* at p. 1311.

Another Louisiana case involving the propriety of raising the issue of the unconstitutionality of a statute at the appellate level was considered in *Hodges Ward Burrington Properties v. Lee*, 601 So. 2d 358 (La. App. 5th Cir. 1992):

> "We are unable to address the constitutionality of LSA-R.S. 47:2180.1 since it is well established that the constitutionality of a statute must first

> be questioned in the trial court, not the appellate court . . . Furthermore, the claim of unconstitutionality must be specifically pleaded in a proceeding in which the attorney general is served as an indispensable party." *Hodges Ward* at p. 360.

As acknowledged by petitioner, the version of the interest statute complained of was only in effect from 1988 through 1992, when the Legislature decided to return to the pre-1988 basis for awarding legal interest on excess compensation awards. Respondent seriously disputes the contention of petitioner in brief that thousands of other Louisiana landowners have been adversely affected. Since the vast majority of landowners either amicably sell to the State, accept the amount deposited in the registry of the court or file an answer soon after the expropriation suit is filed, this version of the interest statute in effect from 1988 through 1992 had little, if any, effect on them. Of those who could have raised the issue, only a few have done so despite the fact that the statute was amended almost three years ago to its pre-1988 form. Clearly the issue raised by petitioner does not involve an *important* question of federal law which needs to be addressed or settled by this Court.

CONCLUSION

The issue raised in this writ application concerns a Louisiana statute which was only in effect from 1988 through 1992. The effect of that temporary statute was not to deny compensation for the taking of property nor interest on excess compensation awarded by the Court. The sole effect was to reasonably limit the beginning of the tolling of interest from the date judicial demand was filed by a landowner for excess compensation. Even if that statutory restriction somehow violated the spirit of the Fifth Amendment to the U.S. Constitution, the State of Louisiana more than made up for it by paying a substantial amount of compensation which would not have been compensable under the Fifth Amendment. The landowner has therefore received more than adequate compensation pursuant to the spirit of the Fifth Amendment to the U.S. Constitution and its writ application should be rejected.

Respectfully submitted,

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Counsel for Respondent

Supreme Court, U.S.
FILED
MAY 5 1995
OFFICE OF THE CLERK

No. 94-1446

In The

Supreme Court of the United States

October Term, 1994

McMILLION DOZER SERVICE, INC.,

Petitioner,

v.

STATE OF LOUISIANA,
DEPARTMENT OF TRANSPORTATION
AND DEVELOPMENT,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Louisiana

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Of
SMITH, JONES & FAWER, L.L.P.
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Counsel of Record for Petitioner McMillion Dozer Service, Inc.

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ARGUMENT

This very brief reply is submitted in response to the opposition brief filed by respondent State of Louisiana, Department of Transportation and Development ("DOTD") in this matter.

Respondent offers essentially four reasons why this Court should decline to exercise certiorari in this matter:

(1) Plaintiff received in compensation for delay damages in the courts below than it complains of not receiving in interest, and therefore, has been over-compensated as it is;

(2) There is no prohibition to a state setting a date after a landowner's property is taken from which interest on any excess award should begin running since there are no cases that specifically address such a delay;

(3) This case is not worthy of this Court's attention since the statute at issue has been repealed, even though it does affect all landowners in Louisiana whose property was taken from 1988 through 1992; and

(4) Plaintiff failed to raise the issue before this Court in the proper manner in the courts below.

The first three of these arguments hardly require response. First, if respondent thought that the award of delay damages to plaintiff in the Louisiana courts was unconstitutional, it surely would have filed for review by cross-petition in this Court. Otherwise, it is certainly inappropriate to try to "offset" a constitutional violation with an argument that plaintiff received more money

than it would have had the case been heard under federal takings law. Second, respondent apparently fails to appreciate the cases cited in plaintiff's original brief decided by this Court that interest from the date of taking is a component of just compensation under the Fifth Amendment. The fact that there are no cases reflecting the effort by a state to limit the onset of interest to some point after the taking but before judgment is meaningless, except as it may reflect on the peculiarities of the State of Louisiana. Third, the importance of this matter lies in the fact that it involves a statute which governs the just compensation to be paid to every landowner in Louisiana whose property was taken over a fifty (50) month period from 1988 through 1992. If not addressed now, this issue will be back before this Court in another petition for writ of certiorari, of that we can be sure.

With respect to the fourth and final argument of respondent, namely the alleged procedural and jurisdictional deficiencies, petitioner is compelled to respond more fully since respondent has apparently overlooked both the undisputed facts in the record of this case and the undisputed law of the State of Louisiana.

Respondent states that petitioner failed to raise properly in the lower courts the constitutional issue put before this Court because (a) the Attorney General for the State of Louisiana was never made a party to the case; and (b) the constitutional issue was first raised at the appellate level. For the first proposition, respondent cites a 1984 Louisiana Supreme Court case, *Lemire v. NOPSI*, 458 So.2d 1308 (La. 1984). Opp. Brief, p. 12. Respondent fails to advise this Court that *Lemire* was partially overruled in *Chamberlain v. State*, 624 So.2d 874 (La. 1993), where the

Louisiana Supreme Court stated that the same language that respondent has quoted to this Court from *Lemire* "was, at the least, an overstatement of the requirements set forth in LSA-C.C.P. Art. 1880." Thus, in *Chamberlain*, the Louisiana Supreme Court held that Article 1880 merely requires that the Attorney General be notified of any constitutional challenge, and expressly ruled that notice by certified mail to the Attorney General satisfies the requirements of Louisiana law. Here, the notice requirement set forth in *Chamberlain* was met, as petitioner sent a certified letter to the Attorney General and filed a copy in the record below. App. 1-5.

Respondent also misleads this Court in suggesting that the constitutional issue here was improperly first raised at the appellate level. Once again, respondent fails to advise this Court of a recent ruling of the Louisiana Supreme Court directly on point, even though that ruling was brought to the attention of respondent in the proceedings below by a letter served and filed in the record. App. 6-8. Specifically, the Louisiana Supreme Court ruled that where one party raises a particular statute for the first time on appeal, the other party has the right to raise for the first time on appeal the argument that the statute is unconstitutional. *Rick v. State of Louisiana, Department of Transportation and Development*, 630 So.2d 1271 (La. 1994). In *Rick*, the same DOTD that is the respondent in this case raised at the appellate level, for the first time, a statutory limitation on pre-judgment interest, and the Louisiana Supreme Court held that it was thus proper for plaintiff to raise for the first time on appeal its argument that the statute was unconstitutional. Similarly, in this matter, the DOTD did not raise the applicability of the 1988 interest statute at the trial court level, even though petitioner

cited the 1992 statute and the *Kirby* case to the trial court. *See* Original Brief, App. 25-27. Rather, respondent only raised the 1988 statute for the first time in its appeal, and therefore, there can be no bar to the petitioner's constitutional challenge.

In any case, it is obvious that neither procedural issue raised by respondent here concerned the Louisiana appellate court, since it overturned the award of interest without even mentioning the procedural issues raised by the DOTD.

In short, respondent's arguments regarding the alleged procedural and jurisdictional bars to the consideration of this matter by this Court are specious. Regarding the substance of petitioner's writ application, respondent's arguments are simply weak. Indeed, respondent does not even attempt to argue that unreasonably depriving a property owner of post-taking interest can be constitutional.

The Petition for Writ of Certiorari should be granted, and this Court should exercise its discretion to reverse and remand by summary process, so that the constitutional guarantee of just compensation for the taking of private property is not violated in the State of Louisiana.

Respectfully submitted,

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[Letterhead Names Omitted In Printing]

December 9, 1993

55,595

BY HAND

Honorable Peter J. Fitzgerald
Clerk of Court
Fifth Circuit Court of Appeal
State of Louisiana
Fourth Floor
Courthouse Annex Building
Gretna, Louisiana 70053

(Filed
Dec. 9, 1993)

Re: State of Louisiana, Department of Transportation & Development v. McMillion Dozer Services, Inc., 5th Circuit No. 93-CA-00590

Dear Mr. Fitzgerald:

Pursuant to the requirements of La. R.S. 13:4448, we are enclosing herewith for filing, together with this letter, our certified letter and signed return receipt of September 30, 1993, to the Attorney General, notifying him of a potential constitutional issue in the captioned appeal. No reply has been received.

Please file stamp the enclosed duplicate of this letter and attachments and return to the Court Runner delivering this to you.

We appreciate your courtesies and attention to this matter,

Respectfully,

/s/ Randall Smith
Randall A. Smith
Of
STONE, PIGMAN, WALTHER,
WITTMANN & HUTCHINSON

Counsel for
McMillion Dozer Service, Inc.

RAS/nbc
Enclosures
cc: Bernard L. Malone, Jr., Esq.
Ronald J. Bertrand, Esq.

STONE, PIGMAN, WALTHER,
WITTMANN & HUTCHINSON
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[Letterhead Names Omitted In Printing]

September 28, 1993

55,595

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Honorable Richard P. Ieyoub
Attorney General, State of Louisiana
22nd Floor, State Capitol
Post Office Box 94005
Baton Rouge, Louisiana 70804

Re: State of Louisiana, Department of Transportation and Development v. McMillion Dozer Service, Inc., Fifth Circuit No. 93-CA-590

Dear Attorney General Ieyoub:

Please consider this to be notice to your office of the pendency of the captioned matter, which may involve the interpretation by the Court of Appeal of whether it would be unconstitutional to apply La. R.S. 48:455 (1988) (repealed) to a judgment rendered after it was repealed. Although we do not think this is a matter that requires notice to your office pursuant to Code of Civil Procedure Article 1880 or otherwise, since our client is a defendant

who is not asking for any type of declaratory relief, and since the only conceivable constitutional issue involved relates to a repealed statute; out of an abundance of caution we are notifying you of the pendency of this suit in case you may wish to take any action therein.

We enclose courtesy copies of the original briefs filed in this matter. No reply brief has been filed yet by the State, and we would have no objection to an extension of time in which to file one, should your office wish to appear in the case. Oral argument is not until December 7, 1993. Bernard L. Malone, Jr. of the Office of General Counsel of the Louisiana Department of Transportation and Development has been handling the matter on appeal for the State. If you have any questions or need any further information, please do not hesitate to let me know.

Very truly yours,

/s/ Randall A. Smith
Randall A. Smith
Of
STONE PIGMAN, WALTHER,
WITTMANN & HUTCHINSON

Counsel for McMillion Dozer
Service, Inc.

RAS/sp
Enclosures

P 918 972 266

SENT TO:

Honorable Richard P. Ieyoub
Attorney General, State of La.
22nd Floor, State Capitol
Post Office Box 94005
Baton Rouge, Louisiana 70804

RECEIPT FOR CERTIFIED MAIL

3. Article Addressed to:

Honorable Richard P. Ieyoub
Attorney General, State of La.
22nd Floor, State Capitol
Post Office Box 94005
Baton Rouge, Louisiana 70804

4. Article Number

P 918 972 266

Type of Service:
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5. Signature – Addressee

6. Signature – Agent
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[Letterhead Names Omitted In Printing]

February 10, 1994

55,595

BY HAND

Honorable Peter J. Fitzgerald
Clerk of Court
Fifth Circuit Court of Appeal
State of Louisiana
Fourth Floor
Courthouse Annex Building
Gretna, Louisiana 70053

(Filed
Feb. 10, 1994)

Re: State of Louisiana, Department of Transportation & Development v. McMillion Dozer Services, Inc., 5th Circuit No. 93-CA-00590

Dear Mr. Fitzgerald:

I am writing this letter in connection with the captioned matter which was argued before a panel of this Court on December 7, 1993. We would ask that you be sure that the enclosed extra copies go to the Judges who were on the panel of this case.

The purpose of this letter is to advise the Court, and specifically the Judges on the panel, of a recent Louisiana

Supreme Court case which was decided after argument on this matter and is directly relevant to one of the issues on appeal. That case is *Rick v. State of Louisiana, Department of Transportation and Development,* 1993 WL 558359 (La. 1994).

One of the issues in the *Rick* case was the constitutionality of a statutory limitation on the amount of prejudgment interest a plaintiff is entitled to against the State of Louisiana. Since that statute was not relied upon by the DOTD at trial, but rather was raised for the first time on appeal, the Louisiana Supreme Court held in *Rick* that "plaintiffs' argument that it is constitutionally invalid should have been considered." *Id.* at p. 5.

Similarly, in the captioned matter pending before this Court, the DOTD did not raise the repealed 1988 interest statute in the lower court but only raised it for the first time on its appeal of the lower court's award of interest from the date of taking. Therefore, as held by the Supreme Court in *Rick,* McMillion's argument that the statute relied upon by the DOTD is constitutionally invalid should be considered by this Court on appeal, despite the protestations of the DOTD to the contrary.

In short, *Rick* stands for the proposition that it is not fair to bar a party from questioning the constitutionality of a statute that the opposing party raises for the first time on appeal. Therefore, this Court should consider the merits of McMillion's arguments regarding the constitutionality of the 1988 repealed statute without considering the procedural bars the DOTD has attempted to raise.

We would be happy to brief this issue if the court should so desire in light of this new case.

We appreciate your courtesy and attention to this matter.

/s/ Randall A. Smith
Randall A. Smith
Of
STONE PIGMAN, WALTHER,
WITTMANN & HUTCHINSON

Counsel for
McMillion Dozer Service, Inc.

RAS/nbc
cc: Bernard L. Malone, Jr., Esq.
Ronald J. Bertrand, Esq.